

Criminal Mediation Committee
Meeting October 5, 2010

Present in person or by phone: Judge Barry Wood, Senior Justice Linda Copple Trout, Roger Bourne, Pam Madarieta, Judge Jeff Brudie, Maureen Laflin and Cathy Derden.

The Committee met as a follow up to the meeting of August 27.

Training. The Committee discussed the hours of training that should be required for judges and justices to be on the roster of criminal mediators. Maureen sent out a copy of the North Carolina rule that requires 24 hours of training. Maureen and Pam opined that training is critical since so many constitutional rights are implicated in the context of mediation and mediation is different from trial work. It also lends credibility to the program. The concern again of others was that it would be too limiting and would prevent judges from being able to mediate cases. After discussion the Committee agreed upon a recommendation of 12 hours of training to have been completed within the last two years to get on the roster. No requirement of continuing training was discussed. It is hoped that the Judicial Education Committee will be able to offer this training in conjunction with other judicial education programs so that it can be available soon.

Mediator privilege. The Committee again discussed the issue of whether there should be an exception to the mediator privilege in post-conviction cases. The more serious the case the more likely there will be an ineffective assistance of counsel claim. The mediator could always be asked or even persuaded to testify but the question is can the mediator be compelled. Allowing a mediator to be called as a possible witness could negatively affect the mediation process; however, a neutral party might be able to settle a post-conviction claim. Currently under I.R.E. 507(5)(a)(6) a mediator cannot be compelled to testify in cases involving alleged professional misconduct during mediation, and the majority of the members believed it should be the decision of the mediator as to whether it made sense to testify in a particular post-conviction case in the context of the allegations made. By a vote of 5 to 1, the members voted to remove the exception for post-conviction cases from the earlier draft of the rule.

Taking the plea. At the last meeting the Committee recommended that the mediator be allowed to take a plea if the assigned judge approved the settlement but was unavailable and all the parties agree the mediator could do so. Maureen reported that she recently spoke with Judge Arnold, who had just attending a meeting on criminal mediation for judges in his district. He said that they do not require the assigned judge to take the plea; however, they do require a judge other than the mediator to take the plea. They are also working up some additional questions for taking the plea in mediated cases, which he agreed to forward to her once they are approved. Upon further discussion of this issue the Committee agreed that the better practice is for the mediator not to take a plea.

I.R.E. 507

The Committee discussed whether I.R.E. 507(5)(b) should be amended by adding a new subsection (3) that states: "This exception shall not apply when the communication

occurred during the mediation of a criminal case.” This addition would provide an absolute privilege in criminal cases short of UPC cases.

Judge Wood noted that in State v. Williams, 877 A.2d 1258 (N.J. 2005), the court performed a balancing act when a defendant wanted a court appointed mediator to testify in a subsequent criminal proceeding despite a court rule that provided “no mediator may participate in any subsequent hearing or trial of the mediated matter or appear as witness or counsel for any person in the same or any related matter.” Though the appellate court found the rule was properly applied, the court undertook a determination of whether the trial court's exclusion of the mediator's testimony under the court rule was constitutionally permissible. The court noted that the Uniform Mediation Act was not in effect at the time the trial court excluded the testimony. The court undertook an assessment of whether the interest in maintaining mediation confidentiality was outweighed by the defendant's need for the mediator's testimony and in the end concluded the defendant's need was not outweighed.

The question for the Committee was whether an absolute privilege in criminal cases should be made clear. This issue was not resolved and left for the next meeting.

Based on this meeting a revised draft of the rule was prepared. It will be circulated to the Administrative Conference and others for comment.

Draft 10-7-10

Rule ____ . Mediation in criminal cases.

In any criminal proceeding, any party or the court may initiate a request for the parties to participate in mediation to resolve some or all of the issues presented in the case. Participation in mediation is voluntary and will take place only upon agreement of all parties. Decision making authority remains with the parties and not the mediator.

(1) *Definition of “Mediation”*. Mediation under this rule is the process by which a neutral mediator assists the parties (defined as the prosecuting attorney on behalf of the State and the Defendant) in reaching a mutually acceptable agreement as to issues in the case, which may include sentencing options, restitution awards, admissibility of evidence and any other issues which will facilitate the resolution of the case. Unless otherwise ordered, mediation shall not stay any other proceeding.

(2) *Matters Subject to Mediation*. All misdemeanor and felony cases shall be subject to mediation if the court deems that it may be beneficial in resolving the case entirely. Issues related, but not limited to, the possibility of reduced charges, agreements about sentencing recommendations or possible Rule 11 agreements, the handling of restitution and continuing relationship with any victim, are all matters which may be referred to mediation.

(3) *Selection of Mediator.* The court shall select a mediator from those maintained on a roster provided by the Administrative Office of the Courts, after considering the recommendations of the parties. That roster will include senior or sitting judges or justices who have indicated a willingness to conduct criminal mediations and who have completed 12 hours of criminal mediation training within the previous two years. If the selected mediator is a senior judge or justice, the mediator will be compensated as with any senior judge service, and approval from the trial court administrator must be obtained by the court prior to the mediation.

(4) *Role of the Mediator.* The role of the mediator shall be limited to facilitating a voluntary settlement between parties in criminal cases. The role of the mediator is to aid the parties in identifying the issues, reducing misunderstandings, exploring options and discussing areas of agreement which can expedite the trial or resolution of the case. The mediator shall not preside over any aspect of the case, other than facilitation of a voluntary settlement according to this rule. The mediator shall not take a guilty plea from nor sentence any defendant in the case.

(5) *Persons to be Present at Mediation.* Participants shall be determined by the attorneys and the mediator.

(6) *Confidentiality.* This section should be read in conjunction with the provisions of I.R.E. 507. Mediation proceedings shall in all respects be privileged and not reported or recorded. No statement made by any participant at the mediation shall be admissible at trial of any defendant in the case or be considered for any purpose in the sentencing of any defendant in the case. No statement made by a defendant in the course of mediation shall be reported to the prosecuting attorney. Any written statements submitted to the mediator by either party as a part of the mediation process shall remain confidential and shall not be disclosed by the mediator to anyone. Any confidential statements or notes taken by the mediator shall all be destroyed at the conclusion of the mediation. The mediator shall not discuss any matter that comes up within the mediation with anyone other than the parties and defense counsel and shall advise the assigned court only as to whether the mediation was successful and, if so, the agreed upon terms.

(7) *Mediator Privilege.* Consistent with I.R.E. 507, a mediator may not be compelled to provide evidence of a mediation communication under this rule.

(8) *Agreements Reached.* Any agreement reached by the parties is subject to approval by the court and is not final until the court agrees to the terms.

(9) *Communications Between Mediator and the Court.* The mediator and the court shall have no contact or communication except that the mediator may, without comment or observation, report to the court:

- (a) that the parties are at an impasse;
- (b) that the parties have reached an agreement. In such case, however, the agreement so reached shall be reduced to writing, signed by the prosecuting attorney, the

Defendant and defense counsel, and submitted to the court for approval;

(c) that meaningful mediation is ongoing;

(d) that the mediator withdraws from the mediation.

(10) *Communications Between Mediator and Attorneys.* The mediator may communicate in advance of the mediation with the attorneys regarding matters of procedure and to become better acquainted with the current state of negotiations and the issues to be resolved in the mediation. This communication may be conducted separately with each of the attorneys and without the presence of the Defendant, so long as the discussions are limited as above and do not include substantive information about the facts of the case.

(11) *Termination of Mediation.* The court, the mediator, or any party may terminate the mediation at any time if further progress toward a reasonable agreement is unlikely or concerns or issues arise which make mediation no longer appropriate.